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No. 37

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

MARTIN V. B. COE, *Petitioner,*

v.

KATHERINE C. COE.

On Writ of Certiorari to the Probate Court for the County of Worcester, Commonwealth of Massachusetts.

BRIEF FOR THE RESPONDENT.

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Opinions Below.

The report of material facts by the Probate Court for Worcester County (R. 45-51) is not reported. The opinion of the Supreme Judicial Court of Massachusetts on the first appeal in this proceeding (R. 612-616) is reported in 316 Mass. 423, and the opinion in the second appeal (R. 616-627) in 1946 Mass. Adv. Sheets 1127.

Jurisdiction.

The opinion of the Supreme Judicial Court of Massachusetts was entered on October 30, 1946 (R. 627). The record does not show the date of entry of the rescript but the petition for a writ of certiorari was filed on January 28, 1947. The jurisdiction of this Court rests on Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

Petitioner shortly after dismissal of his Massachusetts libel for divorce filed a Nevada divorce suit while Massachusetts separation proceedings were pending on appeal. Respondent after service by mail proceeded to Nevada and filed a cross complaint upon which a divorce decree was entered. Petitioner immediately went through a marriage ceremony in Nevada with another resident of Massachusetts, and all parties returned to Massachusetts. Respondent petitioned the Massachusetts courts for enforcement of the original decree and for increased support and maintenance. Petitioner asked revocation of the original decree for support and maintenance. The questions presented are:

1. Whether the Massachusetts courts properly found that petitioner, as well as respondent, has at all times been domiciled in Massachusetts.

2. Whether the full faith and credit clause and statute require that the Massachusetts courts give conclusive effect to the Nevada decree divorcing Massachusetts domiciliaries.

Constitutional Provisions and Status Involved.

U. S. Constitution, Article IV, Sec. 1:

"Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings

of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

Act of May 26, 1790, 1 Stat. 112, as amended, R. S. sec. 905, U. S. C. 687:

"The acts of the legislature of any State or Territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such State, Territory, or country affixed thereto. The records and judicial proceedings of the courts of any State or Territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."

Massachusetts G. L. (Ter. Ed.), c. 208, sec. 39:

"A divorce decreed in another jurisdiction according to the laws thereof by a court having jurisdiction of the cause and of both the parties shall be valid and effectual in this commonwealth; but if an inhabitant of this commonwealth goes into another jurisdiction to obtain a divorce for a cause occurring here while the parties resided here, or for a cause which would not authorize a divorce by the laws of this commonwealth, a divorce so obtained shall be of no force or effect in this commonwealth."

Nevada Compiled Laws, 1941 Supplement, Section 9460:

Divorce from the bonds of matrimony may be obtained by complaint, under oath, to the district court of any county in which the cause therefor shall have accrued, or in which the defendant shall reside or be found, or in which the plaintiff shall reside, or in which the parties last cohabited, or if plaintiff shall have re-

sided six weeks in the state before suit be brought, for the following causes, or any other causes provided by law:

. . . . . .

Sixth—Extreme cruelty in either party.

. . . . . .

Unless the cause of action shall have accrued within the county while plaintiff and defendant were actually domiciled therein, no court shall have jurisdiction to grant a divorce unless either the plaintiff or the defendant shall have been resident of the state for a period of not less than six weeks preceding the commencement of the action. The complaint in any such suit may state the grounds of divorce in the words of the statute, but either party may demand a bill of particulars as in other civil cases. The judgment or decree of divorce granted under the provisions of this act shall be a final decree.

Statement.

Petitioner was born in Worcester, Massachusetts, and has continued to reside there (R. 46). He married respondent, also a resident of Worcester, in New York City on May 15, 1934 (R. 45-46, 103). They returned to Worcester and resided at 6 Boynton Street, which was owned by petitioner, until 1942 (R. 46, 101, 104). Petitioner had considerable means and until 1939 he and respondent were accustomed to spend about nine months of the year in travel (R. 46, 447-449). Their only residence, however, was Worcester; there petitioner owned two houses and a tract of land, maintained his bank accounts and post office box, registered his automobiles, and paid his taxes (R. 46, 122, 127-128, 131, 156, 166).

Petitioner became friendly with one Dawn Allen in 1939 after which his relations with respondent deteriorated (R. 46, 341-348, 352-353, 363, 450). From October 1940 until October 1942 he maintained a three-room apartment in New York which he ordinarily used during the week, re-

turning to Worcester over the weekend (R. 46, 124-125, 127, 230). Petitioner, before the Nevada divorce proceedings, testified that New York was merely a temporary residence, used for the purpose of obtaining regular treatment for his hearing, and that his home remained in Worcester (R. 184-185, 196, 199, 524). In the present proceedings he testified both to that effect (R. 101, 105, 107) and that he had intended from 1940 to 1942 to make New York his home (R. 103-104, 120, 234). The trial judge found that petitioner's domicile remained in Worcester (R. 46).[1]

Respondent on January 13, 1942, filed a petition for separate support in the Probate Court for the County of Worcester, while petitioner filed a libel for divorce. The cases were heard together. On March 25, 1942, the libel was dismissed and respondent's petition was granted, the decree awarding her $35 a week until further order of the court. Respondent appealed, complaining of the amount of the award. The decree was affirmed on February 25, 1943. *Coe* v. *Coe*, 313 Mass. 232 (R. 46).

Petitioner testified that respondent in April, 1942, came to New York, attempted to enter his apartment, and threatened to kill him if she saw him with another woman (R. 244). ~~Petitioner~~ Respondent and her sister testified that she was not in New York and did not leave Worcester in April, 1942 (R. 428-429, 522-523). The trial judge found petitioner's testimony to be false (R. 49-50).

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[1] The judge commented on petitioner's contradictory statements (R. 48). It is also significant that petitioner during this period paid poll taxes in Worcester (R. 122, 156-157), maintained and paid all accounts for his two Worcester houses (R. 127-128), continued his bank accounts and post office box there (R. 159-161), used his Worcester address in correspondence (R. 160-162), and gave his address as Worcester when incorporating a personal corporation (R. 339, 607). The contrary evidence is simply that he also maintained bank accounts in New York, where he kept the bulk of his current funds (R. 236), had done jury duty there (R. 232), had one of his automobiles registered in New York (R. 131), and had in 1939 incorporated a New York securities corporation (R. 229-230).

Petitioner left New York on May 31 and, accompanied by Dawn Allen and her mother, arrived in Reno, Nevada, on June 10; he consulted an attorney, to whom his Worcester attorney had written, about a divorce from respondent on June 11, the next day. (R. 46-47, 173, 272). Six weeks and one day later he swore to the papers in a divorce proceeding and a decree of divorce was entered on September 19, 1942 (R. 47). On the same day he was married to Dawn (R. 48). Two days later he left Reno, returned to New York, gave up his apartment there, and after 5 days in New York returned to Worcester, where he has since resided (R. 50, 167-168, 253-254).

Petitioner in February, 1945, nevertheless testified that he has ever since June, 1942, been domiciled in and a *bona fide* resident of Nevada. His testimony and that of Dawn, with an occasional contradiction noted in the margin, is: In April, 1942, he told his counsel he would like to move to Nevada to help his asthma and to take advantage of the liberal tax laws; counsel said he might as well get a divorce while there but advised he would have to live there indefinitely for this purpose (R. 245-246). Counsel supplied him with a divorce memorandum for Nevada divorce counsel; this he took with him, but not, however, with any purpose of obtaining a divorce[2] (R. 280-282, 601-604) Dawn and her mother spent the last few days of May in petitioner's New York apartment; they drove to Nevada with him because her mother wanted the trip and because Dawn could help petitioner in his business (R. 276-278, 354.) Petitioner had never heard that only six weeks residence was necessary for a Nevada divorce decree; the travelers never mentioned any divorce proceeding, and the first Dawn heard of a divorce was when she accompanied petitioner to counsel's office on the day after their arrival; neither she nor petitioner had any intention to marry each other

[2] He nevertheless testified at one point that he went to Nevada for a divorce (R. 115) and at another that he went on advice of counsel (R. 173).

(R. 118-119, 274-275, 368-372).[3] Dawn and her mother returned to New York on June 12 or 13, petitioner buying the tickets and giving her $100 (R. 250-251, 361, 390).

Petitioner had his automobile registered in Nevada and opened a bank account and took out a post office box in Reno (R. 252). He moved to the Del Monte Ranch on June 17 (R. 252). He had, it was testified, made no arrangements with Dawn for her return (R. 372-374).[4] Dawn nevertheless returned to Reno either on July 18 or in late August; petitioner's Nevada counsel advised her to go to Lake Tahoe, California (R. 176, 374-375). After one or two days in Reno, she left for Lake Tahoe; petitioner paid her expenses there, drove over for dinner twice, received a visit from her in Reno, and after a short visit in Los Angeles spent several days in July or August at Lake Tahoe visiting Dawn or friends[5] (R. 176, 252-253, 270, 374-376).

When respondent received by mail copies of petitioner's divorce summons and complaint, she decided to go to Reno to defend against petitioner's action and to obtain her own divorce; she arrived there on August 25, 1942 (R. 430-433). She was referred to an attorney by the Reno Chamber of Commerce; he advised her on August 28 not to contest petitioner's action for a divorce because her funds, some $1500, were insufficient for a trial, which might take weeks and would undoubtedly end in a decree of divorce in any

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[3] Petitioner at one point went so far as to deny discussing a divorce even with Nevada counsel; during the course of 10 consecutive answers he insisted that he simply gave the attorney the divorce memorandum prepared by Massachusetts counsel and did not discuss a divorce at all (R. 284; *cf.* 288).

[4] At another point petitioner admitted arranging for her return to Nevada, but denied having done so in order to marry her (R. 292-293).

[5] Petitioner at one point said he had never left Nevada between June and September of 1942 (R. 167). There is also conflicting testimony as to whether petitioner, as he testified without qualification (R. 176), paid Dawn's Tahoe expenses or whether, as she testified, she paid them out of money given her by petitioner in October, 1940, to cover hospital expenses then incurred (R. 389).

event (R. 433-436). In early September he phoned respondent to say that he had arranged a settlement with petitioner by which she would receive $7500 and $35 a week (R. 436). Respondent, considering the amount too small, refused to sign the papers. She was, however, confined to her bed with illness and her attorney, in daily telephone calls, was persistent. Accordingly, on his advice that there was no alternative, she signed "some papers", without explanation of their contents, on September 16 (R. 436-438, 589-592).

On September 19 respondent's attorney filed an answer and a cross-complaint, which admitted petitioner's allegation of residence in Nevada, prayed a divorce by respondent from petitioner, and set up the September 16 agreement (R. 593-594). Petitioner replied the same day, setting up the agreement and praying a divorce (R. 595-596). The trial was held the same day and was perfunctory; two witnesses testified briefly that they had seen petitioner frequently since June, petitioner testified that he intended to make Nevada his home, and respondent testified that petitioner had been cruel to her (R. 582-587). A decree, granting respondent a divorce and confirming the agreement, was immediately entered (R. 588-589). Neither the parties nor their counsel disclosed to the Nevada court that the Massachusetts court had a few months before dismissed petitioner's libel for divorce, that it had awarded separate support to respondent, or that an appeal from this action was then awaiting argument in the Supreme Judicial Court of Massachusetts.

Respondent on September 19, received from her counsel petitioner's checks for $7500; when she asked how much she owed her counsel he replied that it had been taken care of (R. 442-443). Petitioner on September 19 paid respondent's counsel $1,000 (Opp. R. 604).

Dawn was in Reno on September 19 and immediately after the decree she and petitioner went through a marriage ceremony conducted by the divorce judge and with divorce

counsel serving as best man; she and petitioner testified that this marriage had neither been discussed nor contemplated prior to the decree (R. 48, 274-275, 292-293, 336, 369).

On September 21 the appeal from the Massachusetts Probate Court decree of March 25 was argued in the Supreme Judicial Court. It affirmed on February 25, 1943. *Coe* v. *Coe*, 313 Mass. 232.

Petitioner and Dawn returned to Worcester on October 1, 1942. They resided at 6 Boynton Street, one of petitioner's houses, until February, 1944, when petitioner through a personal realty corporation purchased a more pretentious home at 30 Forest Street where he and Dawn have since lived (R. 101, 107, 168, 258, 302-303, 333-334). Petitioner sold 6 Boynton Street in June 1944; he still owns a house at 2 Boynton Street and acreage outside of town (R. 109, 129, 166). The trial judge found that they were residents of and domiciled in Worcester (R. 50).

Petitioner and Dawn nevertheless testified that they were still domiciled in Nevada. They went to Worcester in October 1942 only in order to sell petitioner's property (R. 254); they viewed 6 Boynton Street as a hotel, not as a home (R. 381); they purchased 30 Forest Street as an investment, not as a residence (R. 302-303).[6] They place reliance upon a trip they made to Nevada in 1943. They stayed at the Del Monte Ranch for a month from the middle of June to the middle of July (R. 169-170). One reason for the trip was to confer with their Nevada counsel (R. 169). Another was to consider the purchase of property in Nevada, and they made an offer on the Del Monte Ranch (R. 254-255). They returned to Worcester, petitioner testified, on the ad-

[6] Petitioner, however, maintains his bank accounts, post office box and auto registration in Worcester (R. 159, 160-161, 181, 384); he pays his poll tax as well as other taxes there (R. 127-8, 156-157); both he and Dawn have consistently described their residence as in Worcester in formal papers unconnected with the divorce proceedings (R. 201, 215, 299-301, 382, 384-385, 610); and petitioner in this very trial testified that he lived at 30 Forest Street (R. 99).

vice of Nevada counsel in order to defend their interests in respondent's proceedings against petitioner in the Massachusetts courts, which had been commenced a month before they left on their visit to Nevada[1] (R. 256-258).

Petitioner, on the advice of counsel, had not by the time of trial paid respondent any money accruing, whether under the Massachusetts decree or the Nevada agreement and decree, after September 19, 1942 (R. 48, 394). Respondent on May 22, 1943, filed against petitioner a petition for contempt of the Massachusetts decree for separate maintenance (R. 1) and on August 30, 1943, a petition for modification of that decree (R. 5-6). Respondent on September 7, 1943, filed a petition for revocation of that decree (R. 7-8).

The Probate Court on October 21, 1943, entered a decree in favor of petitioner, revoking the decree of March 25, 1942, for the separate maintenance of respondent; this was on the ground that petitioner and respondent were no longer husband and wife (R. 16). On appeal, the decree was reversed on June 5, 1944, because the trial court had refused to hear evidence to show that the parties were never domiciled in Nevada and that the Nevada court accordingly was without jurisdiction (R. 612-616). *Coe* v. *Coe*, 316 Mass. 423.

The cause came on for further hearing in February, 1945, and consumed 11 days of hearing in that month (R. 82-562). On May 21, 1945, the court decreed: (a) petitioner should pay respondent $5,000 forthwith and $100 a week thereafter (R. 40); (b) the petition for contempt is dismissed (R. 41); (c) the petition for revocation is dismissed (R. 40-41). The trial judge on July 5, 1945, filed a report of material facts (R. 45-51). On appeal, the Supreme Judicial Court, so far as here relevant, on October 30, 1946, affirmed the decree dismissing the petition for

[1] Respondent's petition for contempt was filed May 22, 1943 (R. 1) and petitioner's counsel made special appearance on July 3, 1943 (R. 3-4). The record does not show when the petition was served. Petitioner and Dawn later in the trial testified that they left for Nevada in May (R. 254, 333-334).

revocation (R. 619-624, 627) and reversed, apparently for further hearing as to petitioner's financial condition, the decree modifying the 1942 decree for separate maintenance (R. 624-626, 627). Petitioner on January 28, 1947, filed a petition for a writ of certiorari which was granted by this Court on March 3, 1947.

Summary of Argument.

I.

Respondent concedes that the case is properly before the Court, recognizing that (A) the judgment of the Supreme Judicial Court of Massachusetts is final, and (B) the Federal question was decided by the State Court and is decisive of the controversy.

II.

In *Williams* v. *North Carolina*, 317 U. S. 287, this Court held that a Nevada divorce obtained by a Nevada domiciliary must be recognized in other states, and in *Williams* v. *North Carolina*, 325 U. S. 226, that an *ex parte* Nevada divorce obtained by one not domiciled in Nevada need not be recognized elsewhere. The opinion in *Williams II* sharply suggests that, if the jurisdictional fact of domicile is not actually litigated, the Nevada decree need not be recognized elsewhere even though both parties were before the Nevada court. That, in any case, was the square decision of this Court in *Andrews* v. *Andrews*, 188 U. S. 14, where the Court sustained the same Massachusetts statute as is here involved, and in *German Savings Society* v. *Dormitzer*, 192 U. S. 125.

III.

A. The same result would be required even if the issue were still open, for the Nevada court was without jurisdiction to decree a divorce. (1) Petitioner has never been domiciled in Nevada, and (2) a court has divorce jurisdiction only if at least one of the parties is a domiciliary.

(3) It is, indeed, doubtful that the Nevada Court has in fact found petitioner to be domiciled there and the full faith and credit question is not necessarily reached in this case.

B. The full faith and credit requirements do not in any event make the Nevada decree conclusive upon the Massachusetts courts.

(1) It is thoroughly settled, both generally and with respect to decrees of divorce, that full faith and credit need not be given a judgment which is in excess of jurisdiction.

(2) The only substantial issue before the Court is whether, by virtue of respondent's appearance in the Nevada proceedings, the issue of Nevada jurisdiction is itself made conclusive upon the Massachusetts courts. (a) The courts have reached divergent results in considering whether the doctrine of *res judicata* applies to the jurisdictional basis of a domestic judgment when both parties were before the court. (b) The principles of comity are, however, clear at least to this extent, that the jurisdiction of the foreign court is always open to attack. (c) The full faith and credit requirements do not convert a sister-state judgment into a domestic judgment. They simply serve to crystallize the principles of comity and to make the decree conclusive rather than *prima facie* evidence of the merits. This Court has at all times and consistently recognized that jurisdictional issues are not concluded by full faith and credit unless they have actually been litigated in the original suit. The full faith and credit requirements compel recognition of judgment which the court had power to enter but neither the purpose of the clause, the interest of either State involved, nor any decision of this Court require that erroneous and non-litigated issues of jurisdiction be made conclusive on other states.

(3) The result thus indicated by the technical rules of law is made doubly compelling when it be remembered that

the Court faces here the question whether Massachusetts can fix her own policy "in matters of most intimate concern." *Williams II*, 231.

C. (1) This Court does not have before it the vexing problem whether divorces should be easy or difficult to obtain. It faces a far simpler question, whether Massachusetts or Nevada should solve this problem for Massachusetts residents.

(2) The Nevada decree, if Massachusetts were compelled to accept it, would make meaningless the statutory and judicial policy which ever since 1836 has forbidden Massachusetts residents to divorce themselves for Massachusetts causes in the courts of another jurisdiction.

(3) The interference with Massachusetts policy is well exemplified by this case: the Nevada divorce was awarded while the Massachusetts litigation was in progress; it was granted on evidence which would have been insufficient in Massachusetts; and, if conclusive upon Massachusetts, would prevent her from making proper provision for a Massachusetts resident left without means of support as the result of the Nevada destruction of a marriage between Massachusetts residents.

(4) Against these compelling grounds of public policy there must be balanced only the inconvenience, already accepted by this Court in *Williams II*, that petitioner and Dawn have got themselves into a situation where they are probably legally married in Nevada and are not in Massachusetts.

Argument.

I.

THE CASE IS PROPERLY BEFORE THE COURT.

A. The Judgment is Final.

On March 25, 1942, a decree was entered for the separate support of respondent. The Massachusetts courts in the present litigation have disposed of three separate proceedings subsequent to that decree: (a) The trial court dismissed respondent's petition for contempt of the 1942 decree (R. 1, 41) and no appeal was taken. (b) The trial court and the appellate court dismissed petitioner's petition for revocation of the 1942 decree (R. 7-8, 40-41, 619-624); the writ of certiorari of this Court is directed to this action. (c) The trial court modified the 1942 decree to provide increased support for respondent (R. 40) and the appellate court seems plainly to have returned this action for a rehearing by the trial court (R. 627), since it found the trial judge to have been justified in finding respondent's financial needs to have increased but in error in his estimate of petitioner's financial worth (R. 626).

The petition for a writ of certiorari sought review of only the action dismissing the petition for revocation. Respondent does not question that the judgment below, so far as it is here involved, was final.

It was, in the first place, the final disposition of a separate proceeding, and was so viewed by the court below (see R. 616, 617, 624, 627). See *Bandini Petroleum Co.* v. *Superior Court*, 284 U. S. 8, 14; *Clark* v. *Williard*, 292 U. S. 112, 117-118.

Even, moreover, if the three petitions before the trial court were viewed as a single proceeding, all that remains under the decree below is a new determination of the amount petitioner should pay for the support of respondent. The federal question under the full faith and credit clause is finally determined, and the subsequent proceedings in the trial court can neither change that decision, add new fed-

eral questions, nor place the case in such a posture that its decision is unnecessary. The decision below is, therefore, final under the cases which hold that the direction of subsequent proceedings for an accounting or receivership or to determine the amount of damages do not diminish the finality of the State court decision so far as concerns review of this Court under Section 237 of the Judicial Code (28 U. S. C. sec. 344). See *Knox Loan Assn.* v. *Phillips*, 300 U. S. 194, 197-198; *Carondelet Canal Co.* v. *Louisiana*, 233 U. S. 362, 371-373; *Belmont Bridge* v. *Wheeling Bridge*, 138 U. S. 287, 290.

B. The Federal Question is Decisive.

The Supreme Judicial Court decided the federal question of full faith and credit on the second appeal in this litigation (R. 613-614) and by plain implication reaffirmed this decision upon the third appeal (R. 621-622). Respondent grants that the rulings as to state law discussed in the opinion are by way of disposal of cumulative arguments of petitioner and are not alternative grounds of decision, so that the federal question was necessarily decided.

Nor does respondent urge that her basic controversy with petitioner can be settled without decision of the federal question. The Nevada divorce decree, if conclusive on Massachusetts, ends the power of the Massachusetts Probate Court to award petitioner support and maintenance. *Rosa v. Rosa*, 296 Mass. 271, 5 N. E. 2d 417; *Cohen v. Cohen*, 319 Mass. 31, 34; 64 N. E. 2d 689. The full faith and credit issue is, therefore, decisive. See *Esenwein* v. *Commonwealth*, 325 U. S. 279, 280.[8]

[8] We suggest below (pp. 26-27) that the Nevada finding of domicil was so inconclusive that the full faith and credit issue is not squarely before this Court for decision. But that issue was raised and decided below, and whether or not the Nevada decree is in truth sufficient to raise a full faith and credit issue is itself a federal question proper for decision by this Court.

II.

THE QUESTION IS SETTLED BY CONTROLLING AUTHORITY.

The facts, as found by the Massachusetts courts, present a very simple issue. Petitioner, while an appeal from a Massachusetts decree for the separate support of respondent was pending, went to Nevada to get a divorce. He never became a *bona fide* resident of Nevada, but remained a domiciliary of Massachusetts. Respondent, when the divorce papers were served upon her by mail, also went to Nevada and, after reaching a reluctant agreement with petitioner, appeared in the Nevada proceeding and filed a cross-complaint. The Nevada court, in a non-adversary proceeding, then proceeded to divorce Massachusetts residents for Massachusetts causes, and granted a decree upon the cross-complaint. We believe it clear that the Federal Constitution does not compel Massachusetts, contrary to its statutory policy of one hundred and eleven years standing, to surrender its control of Massachusetts marriages to whichever of the other states and territories happens at the time to have the most lax laws upon divorce.

This Court in recent Terms has given much attentions to the force which may be given the bargain-counter divorce by the full faith and credit clause and statute. In *Williams* v. *North Carolina*, 317 U. S. 287, it held that a Nevada divorce must be recognized in other States when granted at the suit of a Nevada domiciliary. *Williams* v. *North Carolina*, 325 U. S. 226, on the other hand, held that the Nevada court, for want of jurisdiction, could not conclude the home State when neither party to the divorce was a *bona fide* domiciliary of Nevada. The finding of the Nevada court as to its own jurisdiction, while casting the burden of proof upon the assailant of its decree, was held, in the absence of a Nevada contest, not to bar the courts of the home State from re-examining the jurisdictional fact of domicil. The same result was reached in *Esenwein* v. *Commonwealth*, 325

U. S. 279; it was concurred in by the three Justices who dissented from *Williams II* because *Esenwein* involved a support decree rather than a prosecution for bigamy, and did not present an inescapable conflict between Nevada and the home State over the marital status of the parties.

This case presents one variation from *Williams II* and *Esenwein:* respondent appeared in the Nevada proceedings and filed an answer and cross-complaint, upon which the divorce was decreed, and which contained a routine admission of petitioner's allegation of Nevada residence (R. 593, 599). Had respondent put petitioner's domicil in issue, and had the fact been decided against her, she would have been concluded by the Nevada decree. *Davis* v. *Davis*, 305 U. S. 32. The Nevada court, in short, had personal jurisdiction over those non-resident parties; respondent had an opportunity to contest the jurisdictional fact of domicil; but that fact was not put in issue and respondent, more from bewilderment than from collusion (*supra*, pp. 7-8), conceded that the Nevada court had jurisdiction when in truth it was without power to act.

The effect of the Nevada decree in circumstances such as these was left open in *Williams II* and *Esenwein*. One may draw conflicting inferences from the language of the opinions, but the majority of the Court has indicated with some clarity that the jurisdictional fact of domicil is not made conclusive merely because the parties could have put it in issue. Thus, in *Williams II* (all quotations 325 U. S. at 230) the Court said that jurisdictional questions "after a contest * * * cannot be relitigated as between the parties." "The State of domiciliary origin," it continued, "should not be bound by an unfounded, even if not collusive, recital in the record of a court of another State." The Court noted in the margin that "We have not here a situation where a State disregards the adjudication of another State on the issue of domicil squarely litigated in a truly adversary proceeding." Against these strong *indicia* can be placed only the fact that at one point in *Williams II* the Court noted, by way of contrast to that case, that "it is one

thing to reopen an issue that has been settled after appropriate opportunity to present their contentions has been afforded to all who had an interest in its adjudication." Even this phrasing may largely be reconciled with the preceding quotations if the Court assumed, as we believe it did, that litigious advantage would be taken of the opportunity. Again, the discussion by the Court of the interest of the domiciliary States "in the protection of their social institutions" and of their policies on "matters of most intimate concern" (325 U. S. at 231-232) would have been beside the point had these matters been protected only against the fraud of one party and not also against that of two. Finally, in *Esenwein* the Court in its statement of facts did not consider it sufficiently material to indicate whether or not the Nevada court, in its erroneous finding of jurisdiction, had personal jurisdiction over both the parties(325 U. S. at 279-280).[9]

It is, in truth, unnecessary to weigh in so fine a balance the language of the opinions in *Williams II* and *Esenwein*. Granting that those cases, in themselves, do not foreclose petitioner, the precise issue was decided by this Court 44 years ago, in a case the authority of which has never been questioned. *Andrews* v. *Andrews*, 188 U. S. 14. There the husband in the summer of 1891 left Massachusetts, where both he and his wife were domiciled, and went to South Dakota to get a divorce. He filed suit after a few months'

[9] Justices Black and Douglas, who dissented from *Williams II* but concurred in *Esenwein*, it must be recognized, indicated a view that an opportunity to contest the jurisdictional fact of domicile may be all that is needed to protect the Nevada decree against attack. "It is one thing if the spouse from whom the divorce is obtained appears or is personally served. See *Yarborough* v. *Yarborough*, 290 U. S. 202; *Davis* v. *Davis*, 305 U. S. 32. But I am not convinced that in absence of an appearance or personal service the decree need be given full faith and credit when it comes to maintenance or support of the other spouse or the children." (325 U. S. at 282.) *Davis*, it will be noted, involved square litigation of the jurisdictional fact while *Yarborough* did not present any substantial issue as to the jurisdiction of the divorce court (290 U. S. at 205, *cf.* 211-212).

residence; the wife appeared and by her answer put in issue both the *bona fides* of his South Dakota residence and his allegation of marital fault. She withdrew her answer after a property agreement in April, 1892, and a divorce was decreed in May, 1892, whereupon the husband returned to Massachusetts. He remarried in 1893 and died in 1897 and the validity of his divorce arose upon the competing claims of the two wives to administer his estate. This Court held the South Dakota divorce invalid for want of jurisdiction because of the absence of South Dakota domicil.

The facts in the case at bar, so far as they differ at all, make a stronger case for Massachusetts.[10] In *Andrews* the South Dakota court was at least put on notice of the issue of domicil, but not the Nevada court here. In *Andrews* the husband was in the divorce State for almost a year, but here for only three months. In *Andrews* the wife delayed her attack upon the decree for five years, and until after the husband's death, while here for only eight months. In *Andrews*, in contrast to *Coe*, the husband's remarriage was no part of the divorce plan and there were two children by the second marriage (188 U. S. at 17).

The opinion of this Court in the *Andrews* case is completely applicable to the case at bar. The Court started with the Massachusetts statute which (with minor and irrelevant changes in phrasing) is controlling here: "if an inhabitant of this Commonwealth goes into another jurisdiction to obtain a divorce for a cause occurring here, while the parties resided here, * * * a divorce so obtained shall be of no force or effect within this Commonwealth." The issue was whether the full faith and credit clause made this statute unconstitutional. The Court said (188 U. S. at 31, 32, 41):

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[10] Only two points of difference appear which could possibly be argued to make Massachusetts' case weaker in *Coe* than in *Andrews*: respondent's answer was not withdrawn and the divorce happened to be granted on her cross-complaint rather than on petitioner's complaint. Neither circumstance is in any way material to the decision, or to the wording of the opinion, in *Andrews*.

It follows that the statute in question was but the exercise of an essential attribute of government, to dispute the possession of which would be to deny the authority of the State of Massachusetts to legislate over a subject inherently domestic in its nature and upon which the existence of civilized society depends.

* * * * *

It cannot be doubted that if a State may not forbid the enforcement within its borders of a decree of divorce procured by its own citizens who, whilst retaining their domicil in the prohibiting State, have gone into another State to procure a divorce in fraud of the laws of the domicil, that the existence of all efficacious power on the subject of divorce will be at an end

* * * * *

The principle dominating the subject is that the marriage relation is so interwoven with public policy that the consent of the parties is impotent to dissolve it contrary to the law of the domicil. * * * the appearance of one or both of the parties to a divorce proceeding could not suffice to confer jurisdiction over the subject matter where it was wanting because of the absence of domicil within the State * * *.

The Court pointed out that this result was compelled by *Bell* v. *Bell*, 181 U. S. 175, and *Streitwolf* v. *Streitwolf*, 181 U. S. 179, where the Court had ruled that the full faith and credit clause did not compel recognition of a foreign divorce decree obtained by a plaintiff who had no *bona fide* domicil within the jurisdiction of the divorce court. It was unimportant, he said, that those cases involved an *ex parte* divorce proceeding: "the rulings * * * were predicated upon the proposition that jurisdiction over the subject matter depended upon domicil, and without such domicil there was no authority to decree a divorce." (188 U. S. at 39.)

Chief Justice Fuller, and Justices Harlan, Brown and McKenna joined in the opinion of Mr. Justice White; Justices Brewer, Shiras and Peckham dissented without opinion. Mr. Justice Holmes took no part but had written the opinion of the Massachusetts court, which was affirmed by

the Supreme Court. *Andrews* v. *Andrews*, 176 Mass. 92. There Chief Justice Holmes, after discussing the effect of the wife's appearance in the South Dakota proceeding, concluded (176 Mass. at 96) that "the Commonwealth having intervened by legislation, the appellant gets the benefit of it irrespective of any merits of her own."

The *Andrews* ruling was followed in *German Savings Society* v. *Dormitzer*, 192 U. S. 125, which, too, is determinative of the case at bar. There the mortgagee's interest in the decedent's property could be sustained against the children only if the decedent were validly divorced prior to the mortgage. He had moved to Washington from Kansas but returned to Kansas, at about the time his wife was moving from the state, and filed suit for divorce. Personal service on the wife was made in California; she appeared and entered a general denial. The Kansas court entered a decree of divorce which the Washington court held invalid for want of jurisdiction. (R. 294, 296, 347-349, No. 104, Oct. Term, 1903.) Mr. Justice Holmes, speaking for this Court, said:

> "It is too late now to deny the right collaterally to impeach a decree of divorce made in another State, by proof that it had no jurisdiction, even when the record purports to show jurisdiction and the appearance of the other party. *Andrews* v. *Andrews*, 188 U. S. 14, 39 . . . ."

The *Andrews* and *Dormitzer* cases have many times been accepted by this Court as sound and controlling law, most recently in *Williams II* (325 U. S. at 229). See *Winston* v. *Winston*, 189 U. S. 506; both majority and dissenting opinions in *Haddock* v. *Haddock*, 201 U. S. 562, 583, 608; *Fauntleroy* v. *Lum*, 210 U. S. 230, 237; *Burbank* v. *Ernst*, 232 U. S. 162, 163; *Chicago Life Ins. Co.* v. *Cherry*, 244 U. S. 25, 29; *Roche* v. *McDonald*, 275 U. S. 449, 454. *Andrews* applies squarely here and requires that the judgment of the Supreme Judicial Court of Massachusetts be affirmed.

The following pages show that this Court should affirm the judgment below even if the narrow issue presented were one of first impression, and not one long since settled by this Court.

III. MASSACHUSETTS IS NOT CONCLUDED BY THE NEVADA DIVORCE DECREE.

A. *The Nevada Court Had No Jurisdiction to Decree a Divorce.*

The application of the full faith and credit clause to this case depends upon one proposition of fact, that the parties have at all relevant times been domiciled in Massachusetts, and upon one proposition of law, that the Nevada courts have jurisdiction to grant a divorce only if at least one spouse is domiciled in Nevada.

1. *Petitioner has always been domiciled in Massachusetts.* There is no denial that respondent has, ever since 1927, been domiciled in Massachusetts (R. 46). The only Nevada domicil claimed is that of petitioner.

The trial court found that petitioner "never intended to change his residence from Massachusetts," and "that his claim of residence in Nevada was a fraud" (R. 49), since he "went to Nevada to seek a divorce" and did not have "a bona fide residence in Nevada according to the law of Nevada" (R. 50). The Supreme Judicial Court held that "the judge, to say the least, was not plainly wrong" in finding that petitioner went to Nevada to get a divorce and that his finding that petitioner was domiciled in Massachusetts "was not plainly wrong" (R. 623, 621)[11] There can be no

[11] Both courts gave full consideration to the Nevada decree but neither happened to use a verbal formula by which the courts explained in terms the obvious course of their reasoning: (a) the Nevada decree and record, standing alone, would show a Nevada domicil, but (b) the evidence in the Massachusetts proceedings was sufficient to overcome the *prima facie* force of the Nevada decree. Any conceivable doubt on this score would be removed by its earlier opinion sending the case back to hear evidence to impeach the Nevada decree. "The mere fact that the Nevada judgment of

thought, in view of the facts of this case, that the findings were a pretext by the Massachusetts courts to evade their obligations under the Constitution, or that they were anything but fairly and reasonably made. This Court, accordingly, will not re-examine those facts but will accept the findings of the Massachusetts courts. *Burbank* v. *Ernst*, 232 U. S. 162, 164; *Williams* v. *North Carolina*, 325 U. S. 226, 233, 236-237; *Esenwein* v. *Commonwealth*, 325 U. S. 279, 281.

Even if, moreover, this Court were itself to plunge into the record it would inevitably reach the same conclusion as did the Massachusetts courts. We need not argue the facts set out in the Statement. Petitioner sought to escape conclusions so obvious as to be inescapable through a tale which would strike the most credulous as fanciful, and accumulated in the course of his testimony a remarkable number of contradictions (*supra*, pp. 4-10). The *prima facie* weight of the Nevada decree, indeed, was overcome equally by the facts contradicting the decree and by petitioner's testimony in support of that decree.

2. *Nevada can grant a divorce only if at least one party is domiciled there.* Under the statutes and decisions of Nevada, a divorce can be granted only if the plaintiff is a *bona fide* resident of Nevada; only if his physical presence within the State for the statutory period "was accompanied by the intent to make Nevada his home, and to remain here permanently, or at least for an indefinite time." *Lamb* v. *Lamb*, 57 Nev. 421, 65 P. 2d 872, 875. See, also, *Fleming* v. *Fleming*, 36 Nev. 135, 134 Pac. 445, *Presson* v. *Presson*, 38 Nev. 203, 147 Pac. 1081; *Aspinwall* v. *Aspinwall*, 40 Nev.

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divorce recited that the court had jurisdiction *is not conclusive and it may be contradicted.*". (R. 614; italics added.) There has never been any question but that, if not successfully contradicted, the Nevada decree would be controlling. The court has, therefore, abandoned (either upon reconsideration or by the force of *Williams II*) what apparently was its earlier position, that the burden was on him who offered a foreign divorce decree to show jurisdiction of the foreign court. *Bowditch v. Bowditch*, 314 Mass. 410, 416.

55, 184 Pac. 810; *Walker* v. *Walker*, 45 Nev. 105, 198 Pac. 433; *Latterner* v. *Latterner*, 51 Nev. 285, 274 Pac. 194. If neither party is a resident of Nevada, the necessary jurisdiction over the subject matter is not gained even though both parties appear before the court. *Tiedeman* v. *Tiedeman*, 36 Nev. 494, 499, 137 Pac. 824; *Worthington* v. *District Court*, 37 Nev. 212, 214, 233, 142 Pac. 230.[12]

This Court has consistently applied the same rule under the full faith and credit clause. "Under our system of law, judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicil. • • • The framers of the Constitution were familiar with this jurisdictional prerequisite, and since 1789 neither this Court nor any other court in the English-speaking world has questioned it." *Williams* v. *North Carolina*, 325 U. S. 226, 229. Such were the rulings in *Bell* v. *Bell*, 181 U. S. 175; *Streitwolf* v. *Streitwolf*, 181 U. S. 179; *Andrews* v. *Andrews*, 188 U. S. 14; *Winston* v. *Winston*, 189 U. S. 506, No. 227, Oct. Term, 1902; *Williams II, supra;* and *Esenwein* v. *Commonwealth*, 325 U. S. 279; and such were the bases of the Court's reasoning in *Barber* v. *Barber*, 21 How. 582; *Cheever* v. *Wilson*, 9 Wall. 108; *Cheeley* v. *Clayton*, 110 U. S. 701; *Atherton* v. *Atherton*, 181 U. S. 155; *Lynde* v. *Lynde*, 181 U. S. 183; *Harding* v. *Harding*, 198 U. S. 317, *Thompson* v. *Thompson*, 226 U. S. 551; *Davis* v. *Davis*, 305 U. S. 32; and *William I, supra.*

Under *Haddock* v. *Haddock*, 201 U. S. 562, it was necessary, in order to determine jurisdiction, to seek out the locus of the "matrimonial domicil." It was easily located in the case of the happily married but rather fugitive in the case of those who litigated. In the event of separation, "matrimonial domicil" followed the husband; except that, if the separation were the fault of the husband, then "mat-

[12] There is, on the other hand, no failure of Nevada jurisdiction because the divorce happened to be granted on the cross-complaint of the admittedly non-resident defendant. See text of Nev. Comp. Law, 1941 Supp., sec. 9460, *supra; State* v. *Moran*, 37 Nev. 404, 142 Pac. 534.

rimonial domicil" remained with or followed the wife. "Matrimonial domicil" was not only a fiction, but one the refined application of which could produce rather whimsical results, and the concept has wisely been discarded. *Williams I*, 317 U. S. at 293-304.

It by no means follows that, because "matrimonial domicil" is an aggravating fiction, the same must be true of "domicil" as such. To require that the divorce court must be within a jurisdiction where at least one of the parties resides and makes his home is simply to ensure that a decree so impregnated with public policy will be directed to persons appropriately subject to that public policy. The divorce policy of the Nevada statutes, one must suppose, was framed for those who live in Nevada and not for those whose homes are in Massachusetts. Conversely, so long as both parties to a marriage live in Massachusetts, the conditions upon which they may be divorced are the concern of Massachusetts and not at all that of Nevada. The legitimate and exclusive interest of Massachusetts in a purely Massachusetts marriage and divorce, and the complete lack of a legitimate Nevada interest in such a marriage and divorce, are not fictions. Nor more is the concept of domicil, as a jurisdictional prerequisite for divorce, for this is simply a convenient way to say that the Nevada divorce court has no business granting a divorce to people who live in Massachusetts and not in Nevada.

It is true, as the dissenting opinions in *Williams II* point out, that it is not always easy to determine the fact of domicile. This is not because "domicil" is an illusory or fictional concept but because it is not always easy to tell where a man makes his home—especially if he is attempting, as was petitioner, to perpetrate a fraud upon the Massachusetts and the Nevada courts. But the occasional difficulties of proof are surely less significant than the virtues of the underlying principle that no state should attempt to decree the divorce policy governing a marriage where both parties live in another state. So, at least, this Court has always

held, in rulings recently and unequivocally reaffirmed in the *Williams II* and *Esenwein* cases.

3. *The Nevada decree.* We are met, against this background of plain fact and settled law, by the probability that the full faith and credit question need not be reached, and that even the Nevada court has not found that petitioner was domiciled there. His divorce complaint alleged that he had, for more than six weeks, been "a *bona fide* resident of * * * the State of Nevada" (R. 599). It did not allege either domicil or an intention to reside indefinitely in Nevada. Petitioner's affidavit for publication of summons did, however, allege that he was "domiciled within the State of Nevada" (R. 598) and he testified, perfunctorily, that he intended to make Nevada his home (R. 585). The trial judge made no finding as to petitioner's intention to make Nevada his home, no finding as to his domicil within Neveda, and no finding as to his residence in Nevada. He found only "that the Court has jurisdiction of the plaintiff and defendant and of the subject matter involved." (R. 588-589).

Respondent does not deny that this might be construed as a judicial determination that petitioner was domiciled in Nevada, since under Nevada law the court otherwise would not have jurisdiction "of the subject matter involved" (*supra*, pp. 23-24). It could, on the other hand, be argued with much force that the failure to make a specific finding as to domicil, or even as to residence, was neither oversight nor an over-terse adoption of the statutory and case law of Nevada. The trial judge, beyond any doubt, had seen many plaintiffs come into his court room swearing to a Nevada domicil with their traveling bags already packed; he had, too, at least a fleeting opportunity to observe petitioner's demeanor and the stereotyped nature of his evidence. A reasonably conscientious judge, who was yet in the process of becoming hardened to the Nevada divorce jurisdiction, might very well be prepared in view of the apparent assent of the parties to enter a general con-

clusion that he had jurisdiction and yet be unwilling to use his judicial office to find as a fact that petitioner intended to make Nevada his home.

It is unnecessary to choose among these alternative explanations of the Nevada decree. The important point is that the decree does not purport in terms to adjudge petitioner to be either a resident or a domiciliary of Nevada. There is, therefore, no question necessarily presented of giving full faith and credit to an adjudication of petitioner's domicil. The full faith and credit clause, in its farthest extension, could hardly be thought to require the invalidation of the Massachusetts statute, the frustration of its domestic relations policy, and the disregard of its judicial findings made after a full trial, simply in order to give effect to an inferred finding by the Nevada divorce court.

Respondent, therefore, respectfully suggests that this is not an appropriate case to decide whether the Massachusetts statute and policy and judicial determination must be invalidated because of the operation of the full faith and credit clause. Questions so weighty are, by long tradition of this Court, postponed until such time as they are squarely presented. See *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 346-348; *Rescue Army* v. *Los Angeles*, No. 574, Oct. Term, 1946, pp. 18-25; and cases cited. Those issues are not squarely presented until the Nevada court has unequivocally found that the Massachusetts resident is domiciled in Nevada, and has by that finding prepared the way for a square conflict of judicial determination of the jurisdictional fact of domicil.

If, however, the Court should construe the Nevada decree to be an adjudication of Nevada domicil, we submit that the Nevada decree cannot conclude the Massachusetts courts from inquiring into the Nevada jurisdiction.

B. The Nevada Decree Is Not Conclusive Upon the Massachusetts Courts.

The Nevada divorce decree was beyond the jurisdiction of the Nevada court since neither petitioner nor respondent was domiciled there. The sole remaining question is whether the full faith and credit clause compels the Massachusetts courts, which do have jurisdiction, to enforce, against the settled public policy of Massachusetts, this decree of the Nevada court, which did not have jurisdiction.

1. *A judgment in excess of jurisdiction need not be given full faith and credit.* The Nevada decree, assuming it to embrace a sufficiently specific finding of a Nevada domicil, would be immune in the Nevada courts against an action to vacate it for want of domiciliary jurisdiction. *Confer* v. *Second Judicial District Court,* 49 Nev. 18, 234 Pac. 688; 236 Pac. 1097; *Chamblin* v. *Chamblin,* 55 Nev. 146, 27 P. (2d) 1061; *Calvert* v. *Calvert,* 61 Nev. 168, 122 P. (2d) 426. This result is placed upon the metaphysical ground that the false allegation of domicil is fraud "intrinsic" rather than "extrinsic" to the decision, and also, in the *Chamblin* case, upon the much more practical ground—so far as concerns the Nevada courts—that there otherwise would be unending litigation. This Nevada rule does not, of course, answer the issue before this Court. It merely shows that there *is* an issue under the full faith and credit clause and statute; were the Nevada rule otherwise, Massachusetts would have without question the same power to re-examine a Nevada judgment as may be exercised by the Nevada courts. *Halvey* v. *Halvey,* 330 U. S. 610, 614.

So far as concerns the full faith and credit requirements, the rule is well settled that the judgment of a sister-state may be impeached in the court of the forum by evidence showing want of jurisdiction in the foreign court. *D'Arcy* v. *Ketchum,* 11 How. 165, 176; *Public Works* v. *Columbia College,* 17 Wall. 521, 528; *Thompson* v. *Whitman,* 18 Wall. 457, *Thormann* v. *Frame,* 176 U. S. 350; *Tilt* v. *Kelsey,* 207 U. S. 43, 53, 59; *Burbank* v. *Ernst,* 232 U. S. 162, 163; *Chi-*

cago Life Ins. Co. v. *Cherry*, 244 U. S. 25, 29; *Roche* v. *McDonald*, 275 U. S. 449, 454; *Adam* v. *Saenger*, 303 U. S. 59, 62; *Treinies* v. *Sunshine Min. Co.*, 308 U. S. 66, 78; *Milliken* v. *Meyer*, 311 U. S. 457. This rule has many times been applied to hold that the divorce decree entered in one state may successfully be attacked in the courts of another upon showing that the decree was entered without jurisdiction of the subject matter because neither party was a *bona fide* domiciliary of the state. *Bell* v. *Bell*, 181 U. S. 175; *Streitwolf* v. *Streitwolf*, 181 U. S. 179; *Andrews* v. *Andrews*, 188 U. S. 14; *Winston* v. *Winston*, 189 U. S. 506; *German Savings Society* v. *Dormitzer*, 192 U. S. 125, 128; *Williams* v. *North Carolina*, 325 U. S. 226; *Esenwein* v. *Commonwealth*, 325 U. S. 279.[13]

Since neither petitioner nor respondent was domiciled in Nevada, the divorce decree of the District Court of that State was in excess of its jurisdiction and may under long settled law be attacked in the Massachusetts courts.

2. *Respondent's participation does not save the Nevada divorce decree.* The only substantial issue presented by this case is whether the Massachusetts courts are in some manner bound to enforce the Nevada decree, notwithstanding that it was beyond the Nevada jurisdiction, because respondent appeared before that court in person and filed an answer and cross-complaint, on which the decree was entered. This issue was squarely presented and unequivocally decided in *Andrews* v. *Andrews*, 188 U. S. 14, and *German*

[13] The rule has always been accepted in the decisions holding that, since domicil was shown, the foreign decree was entitled to full faith and credit. *Barber* v. *Barber*, 21 How. 582; *Cheever* v. *Wilson*, 9 Wall. 108, 123; *Atherton* v. *Atherton*, 181 U. S. 155, 162; *Lynde* v. *Lynde*, 181 U. S. 183; *Harding* v. *Harding*, 198 U. S. 317; *Thompson* v. *Thompson*, 226 U. S. 551, 561; *Williams* v. *North Carolina*, 317 U. S. 287; see *Bates* v. *Bodie*, 245 U. S. 520, 527-528.

Haddock v. *Haddock*, 201 U. S. 562 stands alone in squarely requiring "matrimonial domicil" for jurisdiction, but the dissenting as well as the majority opinion recognized that the domicil of one party must be shown (201 U. S. at 608).

Savings Society v. *Dormitzer*, 192 U. S. 125 (*supra*, pp. 18-21). The same result, however, would be compelled if those cases had never been decided.

The problem has conceptual complications because it involves a series of closely related principles—*res judicata*, estoppel, comity and the full faith and credit clause—which are ordinarily treated more or less interchangeably in the opinions. We believe, so far at least as this issue is concerned, there is nothing to be gained by a nice discrimination between the rules of *res judicata* and those of estoppel as applied to a party to the former litigation. It seems, on the other hand, necessary to place the full faith and credit issue against the background of (a) the common law rules of *res judicata* as applied to domestic judgments, and (b) the rules of comity, if the constitutional question—which alone is before this Court—can properly be understood.

(a) *Res judicata and domestic judgments.* The general rule is clear: no judgment is *res judicata*, even as between the same parties and with respect to the same cause of action, unless the court had jurisdiction, both of the parties and of the subject matter, to render it. *Am. Law Inst., Restatement, Judgments*, sec. 5; *Freeman*, Judgments, secs. 333, 337.

To this rule there is one exception which is recognized in all courts: where in the first trial the parties have actually litigated the jurisdictional issue, whether it be one of law or of fact, the decision is *res judicata* as to jurisdiction itself as well as to all other issues involved. See *Forsyth* v. *Hammond*, 166 U. S. 506, 517; *Baldwin* v. *Traveling Men's Assn.*, 283 U. S. 522, 525; *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 165; *Stoll* v. *Gottlieb*, 305 U. S. 165, 177.

The domestic counterpart of the issue before this Court is the capacity of the party who has appeared in the first suit, but has not despite this opportunity litigated the jurisdictional issue, to defend against the plea of *res judi-*

cata on the ground that the original court was without jurisdiction. In some circumstances and in some courts the collateral attack upon jurisdiction will be allowed. This is on the theory that jurisdiction is in any case necessary for *res judicata*, or that jurisdiction of the subject matter cannot be conferred by consent of the parties. See, e.g., *Vallely* v. *Northern Fire Ins. Co.*, 254 U. S. 348, 356; *Freeman*, Judgments, Secs. 337, 377, 642, 661; cases cited 14 Am. Jur. 380-381, 30 *id.* 940-941. A majority of the decisions, however, hold that with respect to domestic judgments *res judicata* applies to jurisdictional as well as to other issues, or reach the same result by raising an estoppel against the party who has participated in or benefited by a judgment. See, e.g., *Des Moines Nav. Co.* v. *Iowa Homestead Co.*, 123 U. S. 552, 558-559; *Chicot County Dist.* v. *State Bank*, 308 U. S. 371, 378; *Freeman*, Judgments, Secs. 350, 376, 660, 710; cases cited 31 Am. Jur. 86-87, 93. It goes beyond the necessities of this case to attempt any wholesale reconciliation of these decisions,[14] see *Stoll* v. *Gottlieb*, 305 U. S. 165, 176, for this Court faces no question of the common law of *res judicata* as applied to domestic judgments but simply one as to the constitutional limitations upon the power of Massachusetts to make its own choice among these competing decisions when the judgment pleaded in bar is not domestic but that of a sister state.

(b) *Comity.* There is no such diversity of decision in the common law doctrine of comity. The principles of comity offer no impediment whatever to the Massachusetts courts in rejecting a diverce obtained from a foreign court

[14] Perhaps the most thoughtful examination, producing a rather complex reconciliation on the ground of the strength of the competing policies for *res judicata* and against excess of jurisdiction, is found in *Am. Law Inst. Restatement*, Judgments, sec. 10. Comment (c) to this section notes that a collateral attack on jurisdiction is in any case possible, notwithstanding the appearance of the parties, when neither the jurisdictional nor any other issue is litigated.

lacking jurisdiction. Indeed, the foreign judgment, even if the jurisdiction were unchallenged, is given only *prima facie* and not conclusive weight on the merits. *Hilton* v. *Guyot*, 159 U. S. 113, 163-187. Under the settled doctrines of comity, the court of the forum is always free to inquire into the jurisdiction of the court whose judgment is offered as *res judicata*, whether or not the party challenging the judgment appeared in the foreign proceeding, so long at least as the jurisdictional issue were not actually litigated in the foreign court.[15] *Rose* v. *Himely*, 4 Cranch 241, 269-271; *Freeman*, Judgments (5th Ed.), Secs. 1484, 1510a; *Beale*, Conflict of Laws, Sec. 450.9. Thus, in *Stirling* v. *Stirling*, [1908] 2 Ch. 344, the English court refused to recognize a South Dakota divorce of British subjects even though the husband was present in the South Dakota proceedings and the wife appeared through an attorney.

(c) *Full Faith and Credit.* The constitutional and statutory requirements that full faith and credit be given to the judgments of sister states present an issue differing both from the common law doctrine of *res judicata* as applied to domestic judgments and the much more limited requirements of comity for foreign judgments.

It is clear enough that the full faith and credit clause and statute were not designed to place the sister-state judgment on the same footing as a domestic judgment, but simply to crystallize and to afford a federal sanction for the common law principles of comity. *McElmoyle* v. *Cohen*, 13 Pet. 312, 325; *Williams* v. *North Carolina*, 325 U. S. 226, 228-229.

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[15] It is not entirely clear whether the foreign judgment is conclusive under the principles of comity even if the jurisdictional issue were actually litigated before the foreign court. Thus, a foreign judgment may be attacked for fraud (false testimony) even though the same issue were raised in the foreign court. *Abouloff* v. *Oppenheimer*, [1882] 10 Q. B. D. 295, *Vadala* v. *Lawes*, [1890] 25 Q. B. D. 310; see *Hilton* v. *Guyot*, 159 U. S. 113, 207-210. Although it would seem to follow *a fortiori* that jurisdictional issues are not foreclosed, we have found no case in which the precise issue was raised.

In one respect only did these federal requirements change the prevailing common law doctrines of comity: the judgments of courts of competent jurisdiction were made conclusive, not merely *prima facie* evidence, of the merits. But the very cases which formulated this additional requirement over the rules of comity were careful to point out that full faith and credit did not compel recognition of judgments in excess of jurisdiction. *McElmoyle* v. *Cohen, supra,* 326-327; *D'Arcy* v. *Ketchum,* 11 How. 165, 175-176; *Hilton* v. *Guyot, supra,* 184-185. The Constitutional Convention itself apparently viewed the precursor of the full faith and credit clause[16] as substantially identical with Randolph's phrasing, which in terms made the binding operation of the foreign judgment dependent upon jurisdiction, for it committed both to the Committee of Style, 2 *Farrand,* Records of the Federal Convention, 448.

The force, then, to be given the judgment entered with jurisdiction of the parties but not of the subject matter, when the jurisdictional issue was not litigated, is this: In the case of domestic judgments, a majority but not all of the courts will hold it immune to collateral attack. In the case of a foreign judgment it is under the uniformly followed rules of comity always open to collateral attack. It necessarily follows, since in an attack upon jurisdiction the guiding principles under the full faith and credit requirements are to be drawn from the rules of comity and not from those of domestic judgments, that the sister-state jurisdiction is open to attack.

The Court will note, that, even were the conclusion otherwise, and the Nevada judgment given by full faith and credit the same status in the Massachusetts courts as a Massachusetts judgment, there is nothing to compel its automatic enforcement. Even in the case of domestic judgments, the best rule seems to be that there may be collateral

[16] It was drawn from par. 3 of Art. IV of the Articles of Confederation, and offered in much the same form to the Constitutional Convention.

attack on jurisdiction when there was no litigation of any issue in the original suit. Am. Law. Inst., *Judgments*, Sec. 10, Comment (c). And Massachusetts is surely not forbidden by the Constitution from adopting the majority, the minority, or the more refined A.L.I. rule of *res judicata* as applied to domestic judgments. The full faith and credit clause, in short, ensures only that the foreign judgment will be given full respect under the principles of comity; it does attempt to serve as a magic talisman for the traveling litigant and gives no command to the Massachusetts courts that the party offering the foreign judgment must in every case prevail on all issues related to the judgment. *Fall* v. *Eastin*, 215 U. S. 1, 15; *Bagley* v. *General Fire Extinguisher Co.*, 212 U. S. 477, 480.[17]

Those considerations indicate quite plainly, as a matter of principle, that the full faith and credit clause does not preclude the Massachusetts courts from accepting a challenge to the jurisdiction of a Nevada court when its judgment is offered as *res judicata* in Massachusetts, and that even though the assailant of the Nevada judgment appeared in those proceedings. The decisions of this Court are equally clear and entirely uniform.

Massachusetts would have been required to accept the Nevada judgment as *res judicata* only if the jurisdictional fact had actually been litigated in Nevada and a decision

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[17] Mr. Justice Holmes, concurring in the *Fall* case, said (215 U. S. at 15):

> Now if the Court saw fit to deny the effect of a judgment upon privies in title, or if it considered the defendant an innocent purchaser, I do not see what we have to do with its decision, however wrong.

Again, speaking for the Court in the *Bagley* case, he said (212 U. S. at 480):

> If the judgment binds the defendant it is not by its own operation, even with the Constitution behind it, but by an estoppel arising out of the defendant's contract with the plaintiff and the notice to defend. * * * Even if wrong, [the decision] did not deny the Michigan judgments their full effect.

reached in favor of jurisdiction. *Baldwin* v. *Traveling Men's Assn.*, 283 U. S. 522, 525-526; *Davis* v. *Davis*, 305 U. S. 32, 40; *cf. Treinies* v. *Sunshine Min. Co.*, 308 U. S. 66, 78.[18]

In the case at bar respondent appeared in the Nevada proceedings and could have raised the jurisdictional issue but failed to do so. The unbroken decisions of this Court are that the Massachusetts courts in such circumstances are not barred by the full faith and credit requirements from hearing an attack upon the Nevada jurisdiction. *Thompson* v. *Whitman*, 18 Wall. 457;[19] *United States* v. *Walker*, 109 U. S. 258, 265-267; *Carpenter* v. *Strange*, 141 U. S. 87, 106; *Andrews* v. *Andrews*, 188 U. S. 14, 30, 40-41; *German Savings Society* v. *Dormitzer*, 192 U. S. 125; *Clarke* v. *Clarke*, 178 U. S. 186, 195; see *Chicago Life Ins. Co.* v. *Cherry*, 244 U. S. 25, 29. We have found no case reaching a contrary result.

We do not consider the rulings of the state courts especially important on the full faith and credit issue now before

[18] It is not too important, given the clarity of the decisions of this Court, that the theory of this exception be squared with the general rule that the full faith and credit clause does not compel recognition of a judgment which is in fact beyond the jurisdiction of the Court. It can, however, be explained on any of several grounds: (a) it is possible that even under the rules of comity, a jurisdictional issue actually litigated will not be reexamined (*supra*, note 15, p. 32). (b) The common law of *res judicata* or estoppel as applied to domestic judgments is so universally applied to foreclose jurisdictional issues actually litigated that a contrary result under full faith and credit would be anomolous in every jurisdiction. (c) As a practical matter, the vice of repeated litigation is much greater, and the dangers both of error and of fraud and collusion much less, when there has been actual litigation of the jurisdictional issues.

[19] In *Thompson* v. *Whitman* the assailant of the New Jersey decree of forfeiture was aboard when his vessel was seized, received notice in New York of the forfeiture proceedings and failed to appear in them (R. 15, 17, 19-20, No. 570, Oct. Term, 1873). This seems to be the equivalent of an appearance and a failure to take the opportunity to contest jurisdiction, since the New Jersey proceedings were *in rem*, while the assailant was present at the seizure and had adequate notice of the proceedings.

the Court, since the answer is so clear both as a matter of principle and of precedent in this Court. But our examination[20] indicates that a very clear majority of the state courts, including at least a dozen jurisdictions, will re-examine the jurisdiction of the foreign divorce court when the assailant appeared in the foreign proceedings and had an opportunity to contest the jurisdictional issue but failed to do so.[21] We have found only five states where the contrary rule is still followed, and the rulings are as often placed upon grounds of state law as upon full faith and credit.[22]

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[20] The search has not been exhaustive, and the citations in the following two notes include dictum, where it be clear enough, along with actual decision.

[21] In addition to the Massachusetts cases, we are supported by: *Crouch* v. *Crouch*, 28 Cal. (2d) 243, 169 P. (2d) 897; *Schaeffer* v. *Schaeffer*, 128 Conn. 628, 633, 25 Atl. (2d) 243; *Dyal* v. *Dyal*, 187 Ga. 600, 1 S. E. (2d) 660; *Bonner* v. *Reandrew*, 203 Iowa 1355, 214 N. W. 537; *Blakeslee* v. *Blakeslee*, 213 Ill. App. 168; *Smith* v. *Foto*, 285 Mich. 361, 367, 368, 18 N. W. (2d) 279; *Hollingshead* v. *Hollingshead*, 91 N. J. Eq. 261, 265-271, 110 Atl. 19; *Griesi* v. *Griesi*, 137 N. J. Eq. 336, 340, 44 Atl. (2d) 348; *Golden* v. *Golden*, 41 N. M. 356, 68 P. (2d) 935; *Matter of Lindgren*, 293 N. Y. 18, 24, 55 N. E. (2d) 849; *Solotoff* v. *Solotoff*, 269 A. D. 677, 777, 56 N. Y. S. (2d) 5; *State* v. *Westmoreland*, 76 S. C. 145, 56 S. E. 674; *Wampler* v. *Wampler*, 25 Wash. (2d) 258, 269; *Holt* v. *Holt*, 77 F. (2d) 538, 541 (App. D. C.); see, also, *Am. Law. Inst., Restatement*, Judgments, Sec. 10, Comment (c); *Freeman*, Judgments (5th Ed.), Sec. 1429.

[22] *Bledsoe* v. *Seaman*, 77 Kan. 679, 95 Pac. 576; *Norris* v. *Norris*, 200 Minn. 246, 273, 273 N. W. 708; and *Commonwealth* v. *Yarnell*, 313 Pa. 244, 251, 169 Atl. 370, are squarely in point. Respondent would probably be subject to an estoppel preventing jurisdictional attack under *McIntyre* v. *McIntyre*, 211 N. C. 698, 191 S. E. 507, and *Horowitz* v. *Horowitz*, 58 R. I. 396, 400, 192 Atl. 796. *Sleeper* v. *Sleeper*, 129 N. J. Eq. 94, 18 Atl. (2d) 1, is opposed but compare the *Hollingshead* and *Griesi* cases above. *Curry* v. *Curry*, 79 F. (2d) 172 (App. D. C.), raises an estoppel against the party who secured a foreign divorce, and seems to that extent to qualify the *Holt* case above, but the circumstances were aggravated. The New York rule until very recently was contrary to that of Massachusetts but this was on state not federal grounds (see *Glaser* v. *Glaser*, 276 N. Y. 296, 301, 12 N. E. (2d) 305) and seems no longer to hold

Thus, although there is some contrariety of decision,[23] the majority rule among the state courts is in full accord both with the purpose of the full faith and credit clause and statute and with the uniform rulings of this Court.

3. *The issue is one which controls basic public policy.* We have to this point discussed the power of Massachusetts to protect herself against Nevada divorces, fraudulently procured by Massachusetts residents, as though the issue were one simply of the technical rules of conflict of laws, *res adjudicata* and estoppel. It is, of course, far more than that.

The grave issue of public policy which lies just below the surface of the technical issues goes to the heart of basic social policies of the Commonwealth of Massachusetts. The full faith and credit clause, and the implementing act of Congress, do not operate mechanically, with blind indifference to the domestic policies of the states. There is, it is true, more room for flexible interpretation in the case of statutes than of judgments. But even in the latter category, this Court has frequently recognized the necessity that full faith and credit be interpreted against the background of public policy. *Alaska Packers' Assn.* v. *Com'n.*, 294 U. S. 532, 546; *Milwaukee County* v. *White*, 296 U. S. 268, 273-274, and cases cited.

In no field has the Court been more sensitive to the policy of the domiciliary state than in that relating to decrees

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(see *Solotoff* case above). See also, *Am. Law Inst. Restatement*, Conflict of Laws, Sec. 112, but compare *Caveat* at Sec. 451; *Freeman*, Judgments (5th Ed.), Secs. 1436, 1437.

[23] The divergent results reached as a matter of conflict of laws is well illustrated by the American Law Institute Restatements. That on *Conflict of Laws* states in one place that the jurisdictional issue of domicile is subject to collateral attack "by any party not personally before the court" (Sec. 111, comment (a)) and at another that no opinion is expressed as to such an attack by one who did appear and denied jurisdiction. (Sec. 451, caveat and illustration.) That on *Judgments*, using a substantially identical illustration, says the judgment is conclusive against one who appeared and denied jurisdiction. (Sec. 10, illus. 2.)

of divorce. "The settled rule" is that the full faith and credit clause, as the other provisions of the Constitution, is not to be construed with "a blind adherence to mere form in disregard of the substance of things." *Andrews* v. *Andrews*, 188 U. S. 14, 33. The Court has always been aware that in applying the full faith and credit clause to decrees of divorce it must take pains that it will not create a situation by which "the policy of each State in matters of most intimate concern could be subverted by the policy of every other State." *Williams* v. *North Carolina*, 325 U. S. 226, 231.

We discuss below, in a separate point, a few of the issues of policy which inhere in this case. They are separately discussed only for convenience in presentation; in truth they permeate every aspect of the case and can be excluded at any point only at the risk of deciding as abstract technicalities issues which could finally determine the power of the States of this Union to control their most basic social institution.

C. A Reversal of the Decision Below Would Frustrate the Domestic Relations Policy of Massachusetts.

1. *Nevada should not control Massachusetts marriages.* The marriage relationship is far and away the most important institution of our society, and probably no contemporary social problem arouses more deeply felt controversy than the choice between providing an easy or a difficult divorcement of husband and wife. That problem is not one for this Court. The case presents, instead, a far simpler issue of policy: Whether the life of the marriage should be controlled by the State of domicil or, for those with funds to travel, by the State which has at the moment the most lax laws as to divorce and putative residence.

The problem is real and of some magnitude. Nevada, Idaho and the Virgin Islands require only six weeks residence to file a divorce suit, Arkansas and Wyoming only 2 months, and Florida only 90 days. *Warren*, Schouler

Divorce Manual (1944, 1945) 705-720; Laws of V. I., 1944, No. 14. There were about 502,000 divorces in the United States in 1945, or about 3.6 per 1,000 population. Nevada contributed about 14,000 of these divorces (about 105 per 1,000 population), Florida 21,723 (10.5 per 1,000 population), Arkansas 10,811 (6.3 per 1,000 population) and Wyoming 1,331 (5.7 per 1,000 population).[24] Those four states, with only 3.2 per cent of the population, accounted for 9.5 per cent of the divorces in 1945; in the same year they granted about 33,000 divorces in excess of those to be expected, on the basis of the national average, to be obtained by the residents of those states. This suggests that courts of these bargain-counter states were used by non-residents in some 30,000-35,000 cases and that about 7 per cent of the nation's divorces are in fraud of the domiciliary state. This does not show the breakdown of society, nor even a thorough-going ouster of the domiciliary states from control of their own divorces. But the ratio of fraudulent divorces seems to have more than doubled over the last two decades[25] and the trend in this direction may be expected to rise rapidly as competition continues to lower both residence and substantive requirements, and as the national population becomes increasingly mobile.

Whatever the current statistical incidence of the bargain-counter divorce, the destruction of the domestic relations policy of the domiciliary state is just as objectionable in the particular case whether the State must reckon upon

[24] The data in the two sentences above are drawn from National Office of Vital Statistics, U. S. Public Health Service, F. S. A., Marriage and Divorce in the United States, 1937-1945, Sept. 10, 1946, pp. 203, 216-217. The data from Nevada are projected, here, from those for 1944 (12,600 divorces and 94.9 per 1,000 population) and prior years. There are no recent data for Idaho or the Virgin Islands.

[25] See *Cahen*, Statistical Analysis of American Divorce (1932), pp. 66-78. He finds, after elaborate but reasonably persuasive statistical extensions, that in 1922 only about 3 per cent of American divorces involved migration to another state in search of an easier and quicker divorce.

dozens or thousands of similar cases in the same year. And, the Court will note, there would be no way, were petitioner's contentions to be accepted, for Massachusetts to protect its domestic relations policy against a State which chose to grant a divorce, for any cause whatever, to "residents" of six days instead of six weeks past.

This Court in *Williams* v. *North Carolina*, 325 U. S. 226, and *Esenwein* v. *Commonwealth*, 325 U. S. 279, gave the domiciliary state protection against *ex parte* Nevada divorces. This case presents, as did *Andrews* v. *Andrews*, 188 U. S. 14, the issue whether the marriage policy of the domiciliary state is to be protected against a joint application by husband and wife for relief from the laws of their domicil.

There cannot, we respectfully submit, be a difference in result. "Marriage, even considering it as only a civil contract, is so interwoven with the very fabric of society * * * that it may not, when once entered into, be dissolved by the mere consent of the parties." Otherwise, there would be a denial of "the authority of the State of Massachusetts to legislate over a subject inherently domestic in its nature and upon which the existence of a civilized society depends." *Andrews* v. *Andrews*, *supra*, 30-31. This Court in *Williams II* placed its decision in part on policy grounds; these are applicable equally to a joint as to a single effort by fraud to impose Nevada domestic relations upon the domiciliary state. It said (325 U. S. at 231, 232):

> "If a finding by the court of one State that domicil in another State has been abandoned, were conclusive upon the old domiciliary State, the policy of each State in matters of most intimate concern could be subverted by the policy of every other State. This Court has long ago denied the existence of such destructive power."
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> "To permit the necessary finding of domicil by one State to foreclose all States in the protection of their social institutions would be intolerable."

2. *The Massachusetts policy.* This Court is not forced to speculate about the public policy of the Commonwealth of Massachusetts with respect to foreign control of Massachusetts divorces. Ever since 1836 it has had a statutory prohibition against Massachusetts domiciliaries solving their Massachusetts marital problems by resort to the courts of another State. Revised Statutes, 1836, c. 76, sec. 39.[26] In its present form, with only minor and irrelevant changes in phraseology from the original enactment, it reads:

> A divorce decreed in another jurisdiction according to the laws thereof by a court having jurisdiction of the cause and of both the parties shall be valid and effectual in this commonwealth; but if an inhabitant of this commonwealth goes into another jurisdiction to obtain a divorce for a cause occurring here while the parties resided here, or for a cause which would not authorize a divorce by the laws of this commonwealth, a divorce so obtained shall be of no force or effect in this commonwealth. (G. L. (Ter. Ed.) c. 208, sec. 39.)

The Massachusetts statute derives from earlier court decisions of the Commonwealth and has often been considered by the courts of that Commonwealth. Their decisions have made entirely plain the basic public policy which that legislation crystallizes, and have given it an unusual vitality over the entire 111 years since its enactment.

Justice Sewall in *Barber* v. *Root,* 10 Mass. 265, 271, decided in 1813, and referring to the easy divorces then obtainable in Vermont, laid the judicial basis for this legislative policy:

> "* * * the operation of this assumed and extraordinary jurisdiction is an annoyance to the neighboring states, injurious to the morals and habits of their people; and the exercise of it is, for those reasons, to be reprobated in the strongest terms, and to be counteracted by legislative provisions in the offended States."

[26] The section was added by the compilers of the Revised Statutes as a codification of the existing case law. See Preface by Theron and Mann (p. vi) and marginal annotation to c. 76, sec. 39.

Justice Putnam in 1817, said that if effect were to be given to a Vermont decree "we should permit another State to govern our citizens." *Hanover* v. *Turner*, 14 Mass. 227, 231. Chief Justice Shaw in *Chase* v. *Chase*, 6 Gray 157, 161, applied the statute to hold invalid a Maine divorce procured by both of the Massachusetts parties, since the statute "is not made for the benefit of a party • • • but is made upon high considerations of general public policy and public interest, the provisions of which cannot be waived." The Massachusetts courts have to this day consistently recognized and vigilantly enforced the legislative policy of this statute, without regard to the principles of estoppel which might otherwise have carried weight. See *Smith* v. *Smith*, 13 Gray 209; *Hardy* v. *Smith*, 136 Mass. 328; *Andrews* v. *Andrews*, 176 Mass. 92, *aff'd* 188 U. S. 14; *Langewald* v. *Langewald*, 234 Mass. 269, 272, 125 N. E. 566; *Cohen* v. *Cohen*, 319 Mass. 31, 34-36, 64 N. E. (2d) 689; *Sherrer* v. *Sherrer*, 1946 Mass. Adv. 1193, No. 36, Oct. Term, 1947; *cf. Chapman* v. *Chapman*, 224 Mass. 427, 113 N. E. 359.[27]

Their judgment of the importance and the validity of this statute has wholeheartedly been confirmed by this Court in *Andrews* v. *Andrews*, 188 U. S. 14, 31:

> "It follows that the statute in question was but the exercise of an essential attribute of government, to dispute the possession of which would be to deny the authority of the State of Massachusetts to legislate over a subject inherently domestic in its nature and upon which the existence of a civilized society depends."

If that statute were to fall before the full faith and credit clause, the Court continued (p. 32), "the existence of all

[27] The Massachusetts courts have, of course, been equally vigorous in protecting the statutory policy against the purely *ex parte* divorce. *Sewall* v. *Sewall*, 122 Mass. 156, 161; *Maloof* v. *Abdallah*, 218 Mass. 21, 23, 105 N. E. 438; *Bergeron* v. *Bergeron*, 287 Mass. 524, 528-529, 192 N. E. 86; *Bowditch* v. *Bowditch*, 314 Mass. 410, 50 N. E. (2d) 65.

efficacious power on the subject of divorce will be at an end."

3. *The Nevada decree frustrates Massachusetts policy.* The Court is not faced here with an attempt to accomplish a purely academic interference with the basic marriage policies of the Commonwealth of Massachusetts. If petitioner can set up the Nevada decree, procured by fraudulent allegations that he was domiciled in Nevada, as a bar to the power of Massachusetts over the marital relations of Massachusetts residents, he will have accomplished fundamentally different results from that allowed by Massachusetts.

In the first place, the marital difficulties of the parties were pending in the Massachusetts courts at the time petitioner went to Nevada in search of a more accommodating court. On March 25, 1942, the Massachusetts Probate Court after full hearing awarded respondent a decree for separate support and maintenance, and dismissed petitioner's libel for divorce; respondent filed an appeal on April 10, 1942,[28] and petitioner left for Nevada on May 31, 1942 (R. 272). The Nevada divorce decree was entered on September 19, 1942, the respondent's appeal from the Massachusetts decree was argued on September 21, 1942, and the Massachusetts decree affirmed on February 23, 1943. *Coe* v. *Coe*, 313 Mass. 232. There could not be a more thorough intermingling of Massachusetts and Nevada proceedings, nor a more brazen effort to escape the force of a Massachusetts adjudication by fraudulent resort to a forum having no jurisdiction.[29]

[28] The date does not appear in the record but is supplied by Massachusetts counsel for respondent.

[29] Indeed, had petitioner disclosed the Massachusetts proceeding to the Nevada court he could not have obtained a divorce on his own complaint. The Nevada rule is that *res judicata* bars a divorce if the plaintiff in another jurisdiction either failed to obtain a divorce, *Silverman* v. *Silverman*, 52 Nev. 152, 168, 283 Pac. 593; *cf. McLaughlin* v. *McLaughlin*, 48 Nev. 155, 163, 238 Pac. 402, or unsuccessfully resisted a petition for separate support and maintenance.

In the second place, Massachusetts would not allow an absolute divorce between petitioner and respondent upon the grounds offered to the Nevada court. The complete allegation of the cross-complaint, so far as it showed any ground for divorce, was that "plaintiff has treated the defendant with extreme cruelty" (R. 594). The evidence of extreme cruelty is found in a colloquy of 12 leading questions, to which respondent returned a simple affirmative[30] (R. 586). The evidence, even were it believed, would show only that petitioner once either struck respondent or threw a dish at her; that he has been rude and discourteous to her; that he was interested in another woman; that he took an apartment in New York; that he told respondent to leave home because he didn't love her; and that this adversely affected respondent's peace of mind and health. There was no cross-examination or opposing evidence. As we read them, neither the Massachusetts statute, allowing divorce for "cruel and abusive treatment," nor the Massachusetts decisions would permit the divorcement of Massachusetts residents upon evidence such as this. G. L. (Ter. Ed.) c. 208, sec. 1; *Armstrong* v. *Armstrong*, 229 Mass. 592, 118 N. E. 916; *cf. Mooney* v. *Mooney*, 317 Mass. 433, 58 N. E. (2d) 748.

In the third place, the Nevada decree would prevent Massachusetts from making proper provision for a resident of Massachusetts left without means of support as the result of a Nevada destruction of the Massachusetts marriage. The March 25, 1942, decree of separate support was "subject to revision from time to time as circumstances may require," (R. 625).[31] But a valid decree of divorce oper-

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Barber v. *Barber*, 47 Nev. 377, 382, 222 Pac. 284; *Bates* v. *Bates*, 53 Nev. 77, 96, 292 Pac. 298; *cf. Herrick* v. *Herrick*, 55 Nev. 59, 25 P. (2d) 378; *Koch* v. *Koch*, 62 Nev. 399, 405, 152 P. (2d) 284.

[30] She did volunteer about 10 words of elaboration to each of the two questions about the effect on her health, but to none of the others (R. 586).

[31] See, also, *Gifford* v. *Gifford*, 244 Mass. 302, 305, 138 N. E. 550; *Slavinsky* v. *Slavinsky*, 287 Mass. 28, 32, 190 N. E. 826; *Watts* v. *Watts*, 314 Mass. 129, 133, 49 N. E. (2d) 609.

ates to eliminate the obligation of petitioner under the Massachusetts support decree. *Rosa* v. *Rosa*, 296 Mass. 271, 5 N. E. (2d) 417; *Cohen* v. *Cohen*, 319 Mass. 31, 34, 64 N. E. (2d) 689.

The Massachusetts courts, it is true, have full power to modify the alimony payments required by a Massachusetts divorce decree. G. L. (Ter. Ed.) c. 208, sec. 37; *Wilson* v. *Caswell*, 272 Mass. 297, 300-302, 172 N. E. 251; *Watts* v. *Watts*, 314 Mass. 129, 133, 49 N. E. (2d) 609. They have, however, no power to modify a foreign decree for alimony. *Cohen* v. *Cohen*, *supra*. The Nevada decree of divorce, therefore, puts it beyond the power of Massachusetts under her own law to make adequate provision for the support of a Massachusetts wife by her estranged Massachusetts husband.[32]

This is more than a remotely fancied evil. Respondent is seriously and probably permanently ill; she is incapable of employment or, indeed, of household work (R. 50-51, 473-480). She has no means of support save what she may receive from petitioner (R. 458-461, *cf.* R. 463-464). Surely Massachusetts has an interest in ensuring that the cast-off wife of a Massachusetts marriage does not become a charge upon the relief rolls of the Commonwealth. Surely, on any ground of governmental philosophy, this interest is one which is protected and not defeated by the federal constitution.

The facts of this case present, it is true, two ameliorating circumstances: The Nevada agreement and decree do call for the payment of $35 a week to respondent, and there were no children by this marriage. It is, however, important to note that any theory which made the Nevada decree here conclusive on the Massachusetts courts would apply equally where there were children and where the Nevada

[32] Even the Nevada courts, under Nevada law, cannot modify the divorce decree so far as alimony is concerned, since no power to do so was reserved in the decree. *Sweeney* v. *Sweeney*, 42 Nev. 431, 179 Pac. 638; *Dechert* v. *Dechert*, 46 Nev. 140, 205 Pac. 593; *Lewis* v. *Lewis*, 53 Nev. 398, 2 P. (2d) 131.

decree made even more trifling or no provision whatever for their support.

4. *No compelling ground of policy requires that Massachusetts be forced to accept the Nevada decree.* The reasons suggested above seem to make an overwhelming case for the necessity of allowing Massachusetts and not Nevada to control Massachusetts marriages. We recognize that there is one policy consideration which would suggest, if only other things were equal, the desirability of recognizing the Nevada divorce. But this, when measured against the basic concern of Massachusetts, is not entitled to prevail.

It *is* unfortunate that respondent and petitioner do not have the same marital status in Nevada as in Massachusetts. And so, too, it is unfortunate that Dawn is probably the legitimate wife of petitioner in Nevada and is not in the state of their domicil. In some cases this might present a troublesome injustice to the innocent second wife. But here, as is evident from the *Statement* (*supra*, pp. 6-9), Dawn was an active participant in the fraud on the courts of Massachusetts and of Nevada and deserves scant concern from this Court.

These matters have, moreover, explicitly been faced and squarely answered by this Court. It said, in *Williams II* (325 U. S. at 231, 237):

> "Such conflict is inherent in the practical application of the concept of domicil in the context of our federal system. See *Worcester County Co.* v. *Riley*, 302 U. S. 292; *Texas* v. *Florida*, 306 U. S. 398; *District of Columbia* v. *Murphy*, 314 U. S. 441.
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> "If a State cannot foreclose on review here, all the other States by its finding that one spouse is domiciled within its bounds, persons may, no doubt, place themselves in situations that create unhappy consequences for them. This is merely one of those untoward results inevitable in a federal system in which regulation of domestic relations has been left with the States and not given to the national authority. But the occasional

disregard by any one State of the reciprocal obligations of the forty-eight States to respect the constitutional power of each to deal with domestic relations of those domiciled within its borders is hardly an argument for allowing one State to deprive the other forty-seven States of their constitutional rights."

Conclusion.

For the reasons stated above, it is respectfully submitted that the judgment of the Supreme Judicial Court of Massachusetts should be affirmed.

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